IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Gopal Vs. State of Rajasthan
(S.B. CRIMINAL APPEAL NO.205/2004)

2. Kanhaiya Lal Vs. State of Rajasthan
(S.B. CRIMINAL JAIL APPEAL NO.1053/2005)

S. B. Criminal Appeals under Sec.374 (2) Cr.P.C. against the judgment dated 28-5-2003 in Sessions Case No.114/2001 passed by Sh. Ajay Kumar Sharda, RHJS, Special Judge SC/ST (PA Cases) Jhalawar.

Date of Judgment: February 08, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA

Mr. Madhav Mitra, for the appellant Gopal.
Mr. Deepak Goyal, Amicus Curiae for the appellant Kanhaiya Lal.

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT:

Gopal and Kanhaiya Lal, the appellants herein, were put to trial before the learned Special Judge SC/ST (PA Cases) Jhalawar who vide judgment dated May 28, 2001 convicted and sentenced them as under:-

U/s.376 IPC:

Both to suffer rigorous imprisonment for seven years and fine of Rs.2000/-, in default to further suffer simple imprisonment for three months.

U/s.342 IPC:

Both to suffer simple imprisonment for six months and fine of Rs.500/- in default to further suffer simple imprisonment for one month.

The substantive sentences were ordered to run concurrently.

2. It is the prosecution case that informant Puri Lal (Pw.7) submitted a written report (Ex.P-9) at Police Station Bakani on September 26, 2001 with the averments that while on the last Sunday he had gone to the house of his in-laws and remained there, Kanhaiya Lal and Gopal took the advantage of his absence and committed rape on his daughter Kamla (fictitious name) after calling her to the house of one Durgi. This information was communicated to him by his son Kailash. On that report a case was registered under sections 376 and 342/34 IPC and investigation commenced. After usual investigation charge sheet was filed. In due course the case came up for trial before the learned Special Judge SC/ST (PA Cases) Jhalawar. Charges under sections 376 and 342 IPC and Sec.3(2)(5) SC/ST (PA) Act,1989 were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as many as 10 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence. No witness in defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellant as indicated herein above.

3. Learned counsel for the appellant in the process of assailing the impugned finding made following submissions:-

(i) There were improvements in the statements of the prosecutrix at different stages.

(ii) There was no injury on her private parts. Dr.Radhey Shyam (Pw.1) deposed that there was no blood spots or white spots on the private parts of prosecutrix and semen was also not present. Therefore there was no forceful intercourse.

(iii) Age of the prosecutrix was found between 16 to 18 years and it could be inferred that she was a consenting party.

(iv) There was unexplained delay in lodging the report.

4. Learned Public Prosecutor however supported the impugned judgment and canvassed that testimony of prosecutrix was rightly believed by the trial court. Having scanned the material on record and considering the statements of the prosecution witnesses I find the factual situation as under:-

(i) According to Dr.G.S.Chauhan (Pw.2) who performed ossification test of prosecutrix vide Ex.P-4, the age of prosecutrix was between 16 to 18 years.

(ii) Dr. Radhey Shyam Mehar (Pw.1) deposed that since no internal or external injury was found on her genital parts, opinion regarding rape could only be given after receipt of chemical report. Dr. Radhey Shyam Mehar was again examined and in his cross examination he admitted:-

> "मेरे द्वारा बनाया गया वैजाइनल स्वाब स्मीयर में कोई मानव वीर्य नहीं पाया गया .... अगर कोई स्त्री पहली बार संभोग करती है और उसने पहले कभी योन संसर्ग नहीं किया हो तो उसकी योनी से रक्त स्त्राव होना संभव है।"

(iii) The prosecutrix (Pw.9) in her cross examination admitted that she herself had gone to the house of Gopal and after intercourse for 40 minutes her vagina was stained with blood. She also stated that although she got married but her `Gona ceremony' was not performed. She made allegation of rape against Gopal and Kanhaiya Lal both. She also stated that intercourse was committed

with her for the first time.

(iv) Kailash (Pw.6) the brother of prosecutrix however stated that his sister told him that it was Kanhaiya Lal who took her to the house of Gopal and committed rape on her. She did not say to Kailash that Gopal also ravished her.

(v) Kailash (Pw.6) further stated that in his house Gopal resided with his father, mother, brothers and sisters.

(vi) The alleged incident occurred on September 23 and report was lodged on September 26, but it reached to the Ilaqa Magistrate on September 29, 2001.

(vii) In the statement under section 161 CrPC (Ex.D-1) the prosecutrix stated:-

> "बलात्कार करने के बाद मैं उठ कर किवाड़ खोलने लगी तो बाहर की सांकल लगी मिली। करीब 5-7 मिनट बाद पता नहीं किसने सांकल खोली तो मैं किवाड़ खोल कर अपने घर चली गई।"

When she was confronted with this statement, she deposed that she did not state the same before police.

(viii) As per FSL report (Ex.C-1) semen was not detected from vaginal cervical swab.

5. The testimony of prosecutrix in the instant case is vital. She had acquaintance with Kanhaiya and had gone with him willfully to the house of Gopal. The time chosen by her assumes significance. She accompanied Kanhaiya when her father was away from the village and other members of family were not in the house. The testimony of the prosecutrix is thus required to be appreciated in the back ground of entire case. The onus to prove that the accused committed sexual intercourse with prosecutrix

without her consent and against her will as laid down in section 375 IPC is on the prosecution.

6. From the judicial decisions rendered by the Apex Court the law as regards the credibility of the testimony of prosecutrix may be summarized thus:-

(i) There is no rule of law that corroboration is essential before there can be a conviction solely on the testimony of the prosecutrix. But as a matter of prudence, the necessity of corroboration must be present to the mind of the Judge.

(ii) There may be circumstances in a given case which might make it safe to dispense with such a corroboration.

(iii) On the other hand, there may be factors in a case tending to show that the testimony of the prosecutrix suffers from infirmities in a manner so as to make it either unsafe or impossible to base a finding of guilt to the same. Some of the salient factors of this type may briefly be stated thus:-

(a) circumstances showing on the part of prosecutrix an animus against the accused;

(b) where the question of want of consent is material, circumstances tending to show consent: e.g., absence of material showing an attempt at resistance; absence of any marks of struggle;

(c) attempt at improvement or exaggeration in the version as attempted by the prosecutrix;

(d) conduct on the part of the prosecutrix, inconsistency with

the credibility of the version e.g., omission to make a disclosure at the earliest opportunity;

(e) element of artificiality or unnaturalness in the story as attempted by the prosecutrix, and

(f) absence of signs of rape in the findings of the medical examination or on chemical analysis.

7. In the case on hand concededly the prosecutrix, joined the company of appellant Kanhaiya on her own and the report of the incident was lodged after a great delay. Although the prosecutrix stated that two grown up persons committed intercourse with her continuously for a period of 40 minutes, the medical evidence negatives this contention. No external or internal injury was found on her genital parts. She in her initial version admitted that the room where intercourse was committed had been bolted from out side by somebody and after 5 to 7 minutes somebody opened the room and she could go back to her house. In these circumstances, this possibility cannot be ruled out that when she and Kanhaiya were alone in the room of Gopal, somebody had seen them and bolted the room from outside and in order to save her reputation she made false allegations against the appellants. The testimony of prosecutrix appears to be highly untrustworthy and the conviction of the appellants in the facts and circumstances of the case is unsustainable.

8. For these reasons, I allow the appeals and set aside the impugned judgment dated May 28, 2003 of the learned Special Judge, SC/ST (PA Cases) Jhalawar. I acquit the appellants Gopal and Kanhaiya Lal of the charges under sections 376 and 342 IPC. The appellant Gopal is on

bail, he need not surrender and his bail bonds stand discharged. The appellant Kanhaiya Lal, who is in jail, shall be set at liberty forthwith, if not required to be detained in any other case.

(Shiv Kumar Sharma)J.

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